United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-1541

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P/S

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FOR THE SECOND CIRCUIT

BREWER DRY DOCK COMPANY,

Plaintiff-Appellee,

against

SS MORMACLAKE, her engines, etc., and
MOORE-McCORMACK LINES, INC.,

Defendants-Appellants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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POINT I

Brewer failed to come forward with information available to it regarding the degree of care it exercised in hand grinding the tailshaft.

Brewer appears to recognize the legal principle that imposes on a ship repairman the obligation of explaining why the repair was not properly performed. Brewer concludes, however, in its final sentence of Point I, that there was "nothing more that could have been done or offered for proof that would have enhanced the testimony adduced at the trial".

Brewer offered absolutely no evidence with regard to the degree of care which it exercised to prevent the tailshaft from being ground out of round. As stated in Moore-McCormack's Point I, Brewer offered no evidence with

regard to the tools which it used to do the job, the qualifications and experience of the men assigned to the job, or any precautions which it took (such as the use of a template or guide [63a]) to see that the work did not result in the loss of the shaft's concentricity.

Brewer's attempt to excuse itself from liability for the consequences of its failure to render workmanlike performance is in some respects analogous to Brewer's efforts to avoid responsibility for fire damage to *The No. 23*, 54 F. 2d 139 (D.C.E.D.N.Y. 1931). There, Brewer endeavored to show that the shipowner was negligent because it issued a "gas free" certificate stating the vessel was "safe for men and fire". The District Court held that the certificate did not relieve the shipyard from the obligations of its specification which called upon it to clean the tanks before work commenced. The District Court stated at page 140:

> "There was no effort made by the Tide Water Oil people, nor was it to their interest, to have the Brewer Dry Dock Company rely on the cleaning operations or on the certificate At any rate, there is nothing in the record to show that interest. It may be that time was a consideration and that the sooner the repair job was finished, the earlier the delivery of the boat for operations. Be that as it may, the contractor was not freed from his obligation to do what he assumed to do, for there is no proof of a modification of the contract. *International Mercantile Marine Co.* v. *W. & A. Fletcher Co.* (*C.C.A.*) 296 F. 855."

Another somewhat analogous set of facts is to be found in *South Shore Nav. Co., Inc.* v. *Bridgeport Dredge & Dock Co.*, 2 F. Supp. 513 (D.C.E.D.N.Y. 1932). There, the shipowner was awarded an interlocutory decree against the shipyard when its vessel was negligently hauled out on a marine railway with resultant structural damage. The District Court applied the rule referred to in the *Inter-*

national Mercantile Marine case, *supra,* and concluded that the shipyard undertook to employ the requisite skill to haul the vessel out on the marine railway in such a way that no damage would result to the vessel because of the method to be employed. The shipyard sought to excuse its performance by claiming the vessel owner did not provide its docking plans which, if available, would have permitted the shipyard to correctly set the bilge blocks and thereby to have avoided the damage to the vessel. The District Court noted (at page 517) that when the shipyard was advised that no docking plans were available its superintendent made a personal inspection of the vessel below deck to observe the conformation of the under body. The Court said:

> ". . .[*H*]*aving made that inspection, he assumed the responsibility of proceeding with the hauling, but without the docking plans. If damage has been occasioned as the result of the exercise of that judgment, it should not be visited upon the owner, but upon the bailee.*" (Emphasis supplied)

POINT II

Moore-McCormack did not assume control over the repairs.

At Page 7 of Brewer's brief it is stated:

> "In the instant case, shipowner was involved to the point that it assumed direct control over every step in the chain of activity except the grinding, which was the most insignificant factor involved."

Brewer's charge that Moore-McCormack assumed direct control over the repair work is totally without foundation. According to Brewer, forty hours were spent grinding the tailshaft liner (Pl. Ex. 4, p. 2; 72a). The only testimony

relating to Moore-McCormack's presence during the grinding operation was given by Mr. Ballouz who stated that he saw one grinder at work when the job started (38a).

The presence of Moore-McCormack's port engineer from time to time aboard the vessel cannot be held to constitute control over Brewer's employees. The presence of the port engineer can be likened to the presence of the government inspector in *Olsen Water & Towing Co.* v. *United States,* 21 F. 2d 304 (2 Cir. 1927), who was aboard the vessel when she caught fire during repair work. There, a workman holding a bucket to catch sparks dropped the bucket allowing the sparks to escape and ignite. The shipyard argued that the United States was content to have the torch bucket method employed and this excused the shipyard for the resulting fire. This Court rejected that argument, stating at page 306:

> ". . . [I]t may be said that the duty of the inspectors was to see that the contract was fulfilled, not to instruct the contractor in the details of his performance. Their approval would scarcely furnish a legal sanction for his negligence. But, more than that, their approval went only to the method employed, not to the specific act of negligence which was the immediate cause of the fire. Edwards, one of the inspectors, testified that he thought there was no particular danger in the torch, if used 'with discretion'."

Moore-McCormack's port engineer was responsible for eight of his employer's vessels (28a). Brewer's repair crew, on the other hand, was effecting repairs to only one of these vessels. Brewer presumptively had the repair "expertise" and, appellants submit, liability should fall upon it as the party best situated to adopt and utilize proper repair procedures.

The District Court below described (88a) the hand grinding of a tail shaft as a "risky procedure" and stated that

Brewer could not be faulted when "those risks which defendant assumed became a reality". As stated at page 12 of "Brief of Defendants-Appellants", the *Ryan* warranty of workmanlike service is comparable to a manufacturer's warranty of the soundness of its manufactured product. Neither "assumption of risk" nor "contributory negligence" are available, according to leading authority, as defenses in a breach of warranty action. See: *Pritchard* v. *Liggett & Myers Tobacco Company,* 350 F. 2d 479, 485 (3 Cir. 1965), cert. den. 382 U.S. 987 (1966); *Texsun Feed Yards, Inc.* v. *Ralston Purina Company,* 447 F. 2d 660, 668-670 (5 Cir. 1971) (contributory negligence as such, as distinguished from misuse of a product, is not a defense to a breach of warranty cause of action).

In any event, the District Court below made a finding of fact (88a) that "defendant did not prevent or hinder Brewer's performance". See: *Albanese* v. *N. V. Nederl. Amerik Stoomv. Maats,* 346 F. 2d 481, 484 (2 Cir. 1965) (no evidence of "active hindrance" by the ship).

POINT III

It was agreed during the course of the trial that the Court would render an interlocutory judgment with regard to Moore-McCormack's counterclaim.

In its Point III Brewer states:

> "Defendant also suggests that the cause should be remanded with directions to assess Moore-McCormack's damages. Moore-McCormack was on the trial, as was plaintiff, required to prove its damages in full. There was no reservation of the issues of damages and no further proofs can be taken. Defendant rested on its counterclaim and its evidence must be limited to the proof adduced at the trial."

The foregoing statement of Brewer is reckless.

The following colloquy is taken from the appendix at page 62a:

> "Mr. Reilly: Your Honor, I have introduced into evidence now the bills for the work done on the West Coast. In addition to that, you have bills for survey expenses and for loss of charter hire, that is, the government stopped paying us for the ship when she was put in the yard and I wonder if we couldn't save some time, one, by Mr. Meyer and I attempting to agree to those damages and two, in lieu of that, in the event you were to find in favor of Moore-McCormack on its counterclaim merely have an interlocutory judgment.
>
> The Court: Do you mean by that leaving [open] the question—
>
> Mr. Reilly: Of the amount of the damages.
>
> The Court: That seems to me that you and Mr. Meyer, does not agree on it, on the authenticity of the charges. This trial is really not that complicated if you cannot—
>
> Mr. Reilly: With that understanding, your Honor, I would rest."

The 1966 amendments to Rule 53 of the *Federal Rules of Civil Procedure* preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor; especially after an interlocutory judgment determining liability. *Benedict on Admiralty,* Vol. 3, § 412, p. 37 of 1972 supplement.

CONCLUSION

The judgment should be reversed, with costs, and the cause remanded with directions to assess Moore-McCormack's damages and to reduce Brewer's charges by $9,067.00, the amount which it claimed for work on the tailshaft.

Respectfully submitted,

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Services of three (3) copies of
the within Reply Brief is
hereby admitted this 2nd day
of August, 1974
McHugh Heilman Smith & Leonard
Attorney for